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### Arbitration and Fine Dining: Two Faces of Efficiency

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# **ARBITRATION AND FINE DINING**

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## Arbitration and Fine Dining: Two Faces of Efficiency

William W. Park\*

Tout ce qui est excessif devient insignifiant.\*\*

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### I. The Parties' Legitimate Arbitrations

#### A. Rival Goals

Aiming to provide fine dining, a restaurant chef will pay attention to several goals, not all of which marry well one with another. Guests must not wait too long for their meal. Yet a good dish often takes time to prepare. The wine list should offer quality and choice, but without being pretentious or overpriced.

Shortcomings in any one area could turn dinner into disappointment. Few points will be scored if tasty cuisine arrives two hours late, even assuming the customer has not departed in the interim. Prompt service will rarely save bad food. The evening would be ruined by a

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\*\* Charles Maurice de Talleyrand-Périgord, Prince de Talleyrand. ("The excessive becomes insignificant.")

chef who had become preoccupied with any single aspect of fine dining, to the exclusion of the others.

To amplify Talleyrand's observation, the excessive may become not only insignificant, but also counterproductive. Too much emphasis on speed can affect food preparation. An obsession with preparation upsets timely service. Either way, the customer leaves with a grievance.

Like most analogies, comparisons between arbitration and dining will limp badly. Few business managers relish a lawsuit in the way they enjoy an evening with friends at a good restaurant. Yet like dining, arbitral proceedings implicate proportionality and balance among a multitude of factors which can make the experience better or worse.

As we shall explore in a moment, several elements play key roles in evaluation of any arbitration: accuracy, fairness, cost and time, and award enforceability.<sup>1</sup> An inevitable tension exists among these fundamentals. Decisions reached quickly and cheaply will not do an arbitrator much honor if wrong on the substantive merits. A correct result provides little satisfaction to a prevailing party if refused recognition because the arbitrators denied due process or exceeded their jurisdiction.

Many discussions of arbitration focus on efficiency in its slimmest sense, isolating speed and economy from the other elements necessary for the legitimacy of the process. Time and cost are portrayed as enemies, rather than trade-offs in the pursuit of a fair process leading to an accurate and enforceable result.

In this connection, arbitration is often painted as having been infected with poor case management making the process too much like litigation. Critics say that arbitration has lost the "quick, cheap and cheerful" tone that made it popular back when commercial men (as

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<sup>1</sup> For a list of other arbitrator attributes which play into the mix of good (or bad) arbitration, see Thomas Clay, *L'Arbitre est-il un être normal?*, in *L'EXIGENCE DE JUSTICE: MÉLANGES EN L'HONNEUR DE ROBERT BADINTER* 225 (Dalloz 2016).

they inevitably were in those days) visited a warehouse to sniff the corn before lunch, then retired to deliberate with a good bottle of Bordeaux before meeting the parties that afternoon to scold the seller for failing to deliver “Grade A” grain.

Today however, economic disputes rarely yield themselves to the clarity of old-fashioned grain purchases in an imagined golden age of simple arbitration. Although there may be some relatively simple questions (analogous to an umpire calling a baseball player “out” as he slides into home plate), many more will require serious expert testimony on accounting, legal or engineering matters; they may relate to lost profits, competition, taxation, capitalized expenditures, or power plant operation. Controversies may involve long-term energy supply, bio-technology licenses, and multi-party construction projects. Dramatically-changed circumstances may be invoked as a defense to contract performance. Or one side may seek to pierce the corporate veil between a modestly capitalized subsidiary and its better funded parent.

When international elements infuse arbitration, choice-of-law analysis will often play a key role in proper decision-making. For such cases, finding the right answer in a fair fashion may not always be cheap and quick. Unless arbitrators have prejudged the questions presented to them (hardly a recipe for good proceedings) answering complex questions usually takes time.<sup>2</sup>

To some extent, arbitration has become a victim of its own success, as the arbitral process moves beyond the simplicity of earlier days, finding acceptance as a commercially preferred path to decide significant business disputes. Expectations of procedural simplicity often breed disappointment in the context of adjudicatory reality.

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<sup>2</sup> One recalls the Latin maxim *Veritas filia temporis* (truth is the daughter of time) attributed by a second century Roman grammarian to an unnamed predecessor. “*Alius quidam veterum poetarum, cuius nomen mihi nunc memoriae non est, Veritatem Temporis filiam esse dixit.*” (Another ancient poet, whose name I have forgotten, said that Truth was the daughter of Time.) Aulus Gellius, *Noctes Atticae*, XII.11.7.

In the best of all possible worlds, experienced arbitrators will find ways to meet all goals with equal robustness. Yet the best of all worlds frequently eludes us, thus requiring occasional compromise and concession, a matter to which we shall now turn in greater detail.

#### B. Four Aspirations

In his novel *The Three Musketeers*, Alexander Dumas features a trio of brave comrades who sought to guard their king and serve the queen, all the while living by the motto “All for one, one for all”. Similarly, the aspirations of a good arbitrator comprise three core goals: accuracy, fairness and efficiency. Together these duties join in service to a relatively predictable and neutral dispute resolution process promoting the type of economic cooperation enhanced by reliable vindication of ex ante expectations.

The first aim of arbitration must be accuracy in the sense of “getting it right” when determining the facts and applying the law. Award accuracy implicates fidelity to the text of the contract and the context of the relevant bargain. The arbitrator should aim to get as near as reasonably possible to an understanding of what actually happened between the litigants and how the pertinent legal norms apply to the controverted events.<sup>3</sup> Not an absolute truth as might exist in the mind of an omniscient God; but rather a reasonably correct picture of the controverted events, words, and norms that affect claims and defenses. The good arbitrator recognizes that although a perfect understanding of disputed facts often proves elusive, some answers are more correct than others.

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<sup>3</sup> That awards are not generally subject to judicial review for inaccuracy *per se* in no way diminishes an arbitrator’s duty to seek the right result. Arbitration would be a poor form of justice if the process aimed only at satisfying minimum standards for judicial annulment. In modern arbitration law, the limitations on grounds for judicial review (which generally do not include mistake of law or fact as such) derive from respect for the parties’ bargain to have the merits of their dispute decided by an arbitrator rather than a judge. See generally, William W. Park, *Explaining Arbitration Law*, in *DEFINING ISSUES IN INTERNATIONAL ARBITRATION: CELEBRATING 100 YEARS OF THE CHARTERED INSTITUTE OF ARBITRATORS* 7 (Julio César Betancourt, ed. 2016).

Second, the process must be fair. In the context of arbitration, the capacious notion of “fairness” incorporates several elements: to hear before deciding, often called “due process” or “natural’ justice” in the Anglo-American legal world, and *principe du contradictoire* in Francophone legal systems; to respect the contours of arbitral jurisdiction, whether by reason of the relevant contract or some public policy constraint; and to remain impartial and independent. Litigants should expect a decision by arbitrators who avoid pre-judgment, remain unbiased, and demonstrate respect for the limits of their authority, whether fixed by contract, statute or treaty.

Thirdly, arbitrators should aim to avoid undue time and cost, with the devil in the detail surrounding the adjective “undue”. One person’s delay might be another’s due process. As discussed shortly, the efficiency of an arbitration in the narrow sense (low cost and high speed) must be evaluated against broader notions of efficiency related to the choice of procedures appropriate to the case at hand..

Readers of *The Three Musketeers* will remember that the novel’s three initial heroes (Athos, Porthos and Aramis) found themselves joined by a fourth comrade named d’Artagnan, a poor but courageous nobleman from Gascony who hoped to enter the King’s Guards and fight beside his friends. Likewise, the catalogue of arbitrator duties includes an additional aspiration: the award should be enforceable.

Enforceability, the “fourth musketeer” of arbitral duties, touches the interaction of arbitrators and courts, implicating vigilance in promoting an arbitral process that leads to something more than a mere piece of paper. Prevailing litigants expect arbitrators to avoid grounds for annulment or non-recognition by judicial authorities called to review the award.<sup>4</sup>

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<sup>4</sup> This duty of enforceability has been underscored in institutional arbitration rules. Article 35 of the ICC Rules provides: “In all matters not expressly provided for in these Rules, the [ICC] Court and the Arbitral Tribunal shall ... make every effort to make sure that the Award is enforceable at law.” Likewise, the LCIA Rules provide in Article 32.2: “In all matters not

Award defects which taint enforceability would normally include breach of due process, excess of authority, and disregard of mandatory legal norms.

Any thoughtful observer will note that these four aspirations of a good arbitrator will often conflict with one another. Granting an opportunity for more testimony, or additional document production, might enhance procedural fairness, perhaps also furthering substantive accuracy by providing the arbitrator supplemental information on which to base a decision. Yet the potential benefit comes at a cost: delay and extra expense. In turn, any attempt to economize by denying more testimony or document production could lead to challenge of the award by the aggrieved party.

When alternatives seem finely balanced, how does an arbitrator proceed? Does a thumb on the scale tilt for fairness and accuracy, or for efficiency? To these matters we shall now turn.

## II. Contemplating Alternatives

### A. Efficiency from Two Perspectives

In its popular usage, efficiency has come to mean doing things quick and cheap. A process tends to be perceived as efficient if the expense is low and the speed is high.

In arbitration, this narrow definition sometimes runs counter to broader notions of efficiency that implicate effective case management. Arbitrators are expected to craft processes appropriate to the circumstances and proportional to what is at stake. Except for lawyers with a very bad case, arbitration rarely wins accolades for being effective when the proceedings go so fast that the arbitrators lack an adequate opportunity to appreciate evidence and argument. Nor would the prevailing party consider a proceeding efficient if the award ends up being annulled for lack of due process. By contrast, a fair process will usually be accepted as legitimate, even by the side receiving the rough side of the award.

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expressly provided for in these Rules, the LCIA Court, the Arbitral Tribunal and the parties shall ... make every reasonable effort to ensure that an award is legally enforceable.”



Saving time and money (the narrower sense of efficiency) constitutes a means to an end, not the goal itself. The ultimate objective of good case management lies in fixing a process that suits the case.<sup>5</sup> Like the restaurant chef in our opening scenario, arbitrators can spoil things by acting so rapidly as to serving bad food even if arrives quickly.

Seen in this larger context, the juxtaposition of fairness and efficiency may prove a false conflict. Fairness requires some measure of efficiency, since justice too long delayed becomes justice denied. Likewise, without fairness an arbitral proceeding would hardly be efficient, since it would fail to deliver a key element of the desired product: a sense that justice had been respected.

A paradigm articulation of this tension presents itself in Section 33(1) of the 1996 English Arbitration Act, which directs arbitrators to: (i) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (ii) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.<sup>6</sup>

These competing directives provide convenient hooks for counsel to hang procedural arguments, either for or against applications to bifurcate, to compel disclosure, or to move deadlines. However, they contain little inherent guidance on how the arbitrator should weigh competing aims, a nuanced task which generally benefits from an experience level sufficient to guide the tribunal on shared expectations of fairness in the community of arbitration users. Promoting an optimum administration of justice often proves to be an art more than a science,

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<sup>5</sup> In this connection, see generally Fabien Gélinas & Clément Camion, Efficiency and Values in the Constitution of Civil Procedure, 4 (Issue 2) International Journal of Procedural Law 202 (2014). In both commercial settings and investor-state disputes, serious public interests are implicated by reliability, in the sense of promoting positive economic cooperation.

<sup>6</sup> On the interaction between an arbitrator's discretion to craft proceedings and the elements of due process in the context of the 1996 Act, see William W. Park, Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure, 23 *Arb. Int'l* 499 (2007).

with a delicate counterpoise among aims such as speed, economy, accuracy, fairness and enforceability.

## B. Costs and Benefits

### 1. The Last Bad Experience

Rightly or wrongly, much current commentary puts the spotlight on efficiency in its narrow sense, as related to time and cost. Less thought seems to be given to the broader contexts in which speed and economy can operate to the detriment of due process, accuracy and enforceability.<sup>7</sup>

One reason might be that basic fairness has become a “given” to be assured by the judicial supervision of curial courts monitoring the integrity of arbitral proceedings at the time an award receives confirmation or recognition.<sup>8</sup> In addition, the details of each dispute must be considered when questioning the accuracy of an award or the proportionality of a procedural measure.

By contrast, complaints about time and cost require less robust analysis. The confidentiality of proceedings makes it difficult to discuss details about alternative ways to do things, or the optimum paths to equilibrium among various elements of legitimate decision-making. Although thoughtful arbitrators make efforts to “square the circle” so as to

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<sup>7</sup> A 2010 study by the Corporate Counsel International Arbitration Group found that 100% of corporate counsel think arbitration takes too long, and 69% think it costs too much. Lucy Reed, More on Corporate Criticism of International Arbitration, Kluwer Arbitration Blog (16 July 2010), <http://kluwerarbitrationblog.com> (blaming delays in arbitral proceedings on the limited availability of top-tier arbitrators and their “excessive concern for due process”). Another study, co-sponsored by a major law firm and a London university, suggested that 50% of the participating respondents were dissatisfied with the performance of arbitrators in international arbitration. See *2010 International Arbitration Survey: Choices in International Arbitration*, White & Case LLP and School of International Arbitration (Queen Mary, University of London) (2010). The study follows an earlier survey sponsored by PriceWaterhouseCoopers.

<sup>8</sup> Some scholars argue that there has been an overreaction to the prospect of award vacatur. See Klaus Peter Berger & J. Ole Jensen, *Due process paranoia and the procedural judgment rule: a safe harbor for procedural management decisions by international arbitrators*, 32 ARBITRATION INT’L 415 (2016).

reconcile these multiple conflicting goals, the reality of the conflicting tensions often dictates a result that disappoints the seekers of both curves an right angles.

As in many areas of life,<sup>9</sup> the lodestar for evaluating arbitration often resides in some recent bad experience that overshadows other more positive incidents.<sup>10</sup> The business manager who sees her case as wrongly decided will sense grievance that annulment actions cannot be filed for a simple mistake of fact and law, but lie only for breach of due process or excess of authority. By contrast, the corporate executive who just prevailed in an arbitration will likely feel frustrated that the losing side gets any right of court recourse at all, providing a second bite at the apple even for limited grounds. One lawyer feels aggrieved at failure to get an order for fuller document production, to obtain the hoped-for “smoking gun” that will destroy an adversary’s case. By contrast, the recipient of the same discovery order will complain about the overly generous scope of the order that results in senseless waste of time and money combing company files.

Complaints about the efficiency of arbitration often follow similar lines. A claimant will remember that the case did not move as quickly as hoped, failing to recollect that its lawyers agreed to arbitrate in a country known for interventionist judicial proceedings. A respondent will complain about the high cost of having to defend against a meritless claim, forgetting that the proceedings were prolonged because its legal team insisted that without extensive document production their rights would be prejudiced.

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<sup>9</sup> The pattern does not limit itself to arbitration. In most supermarket suggestion boxes, complaints seem to outnumber compliments. Disappointed shoppers unable to find just the right brand of mustard usually feel more aggrieved, and thus are moved to express themselves. On the other hand, relatively few customers fill in such forms to express delight at finding the other 36 items on their shopping list.

<sup>10</sup> Many thanks to my friend Jim Carter for introducing this insight, albeit in a slightly different format.

## 2. Hard Choices

### a) Contract Drafting

Reacting against bad experience sometimes runs in tandem with forgetfulness about our own role in making hard choices. Human nature being what it is, some critics of arbitration (and of arbitrators) forget that time and expense often derive from the very procedural features the parties adopted in an effort to enhance fairness and accuracy.

With a few keystrokes of the computer, contract drafters could adopt some simple adjustments to the standard arbitration clause that would substantially reduce the duration of proceedings and the money spent on legal fees. These changes might (i) provide for one rather than three arbitrators; (ii) ban document production; (iii) limit the size and number of briefs; and (iv) stipulate awards without detailed reasoning. The critics of undue time and cost might also lobby for legislation to eliminate annulment of awards at the arbitral seat, leaving the only judicial recourse at the place of enforcement itself.<sup>11</sup>

Each innovation, however, would carry its own cost, drawing understandable resistance from large segments of the arbitration community. Three arbitrators make for a more rigorous process, as do comprehensive written reasons explaining the legal and factual underpinnings of a decision.<sup>12</sup> Document production reduces the possibility of an unjust result by enhancing the prospect that arbitrators will receive a fuller record, including previously undisclosed letter or emails unfavorable to one side's position. Thorough memorials enhance rigorous analysis. And the right to challenge a defective award where rendered presents the paradigm example of competing costs and benefits. A motion to vacate might add expense just after the award has been made; but even more money may be needed

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<sup>11</sup> The late Professor Fouchard (among others) proposed such legislation two decades ago. *See generally* Philippe Fouchard, *La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 REV. ARB. 329.

<sup>12</sup> More than once, arbitrators have found that initial conclusions “just won’t write” during the award drafting exercise.

to challenge a procedurally defective award in multiple enforcement actions around the world.

The chief downside of any over-simplification lies in the risk of diverting attention and thoughtful reflection from genuine quandaries that reside in the many procedural choices which implicate finely balanced costs and benefits. To bring the debate back to what actually goes on in real-life proceedings, it may be helpful to consider some of the common questions that resist facile analysis and blanket responses.

#### b) A Laundry List of Dilemmas

The situations listed below exemplify some of the dilemmas facing arbitrators in complex cases. Although perfect answers may prove elusive, some solutions will be better than others in accommodating efficiency and fairness.

- Document production. A request for information exchange implicates time, money, and energy. However, losing the case by reason of not getting a key exhibit can be much worse. The arbitrator's dilemma lies in making decisions about relevancy and materiality before a case is fully understood.
- Reconsideration. Following a decision on document production, a dissatisfied party may seek reconsideration and ask for additional material to be disclosed. An automatic refusal to consider the request may result in injustice. Considering the application will in any event require time. If the motion is found to have merit, an order is made to produce additional documents, deadlines may need to be adjusted to take into account the time for one side to produce more documents and for the other side to study the material before the next submission. The addition of days given to the requesting party will likely trigger a call for "equal time" by the other side, sometimes putting hearing schedules in jeopardy.
- Bias. Challenges for arbitrator bias prove disruptive to timetables. Yet even less attractive would be a system with no mechanism to monitor the arbitrator's impartiality and independence.
- Hidden financiers. Concern about arbitrator conflict may lead to requests for disclosure of third-party funders. Addressing the request will take time, and may meet the objection, "What you don't know can't hurt you." Denying the application has its own costs. If it transpires that an arbitrator had links with the person paying bills for the prevailing party, the integrity of the process (if not the validity of the award) would doubtlessly be called into question, regardless of what the arbitrator actually knew at the time.
- Bifurcation. Deciding an issue on a preliminary basis (whether related to jurisdiction or liability) can add time and cost. However, a system would be quite unattractive if

respondents were always forced to engage high-priced experts to present testimony before arbitrators who clearly lack authority, or where no breach of contract had occurred. The appropriateness of bifurcating some questions depends on a fact-specific analysis, implicating factors that include whether one question will remain so intertwined with another as to make a separate hearing duplicative. Analogous concerns arise with respect to summary judgments (dispositive motions) on questions that can be decided without an evidentiary hearing.

### c) Institutional Rules

Arbitral institutions often join the chorus of characterizing time and cost as enemies.

Yet most institutions recognize the trade-offs inherent in speed and economy. The ICC Rules, for example, require arbitrators “to conduct the arbitration in the expeditious and cost-effective manner”<sup>13</sup> while at the same time imposing at least two additional stages of arbitration: signing of Terms of Reference and scrutiny of an award by the ICC Secretariat.<sup>14</sup>

Most institutional rules impose reasoned awards (which can enhance both rigor and transparency) notwithstanding the time taken to provide explanations of a decision when three arbitrators might disagree on the reasoning even if not on the result.

The International Chamber of Commerce requires “Terms of Reference” on the assumption that an early effort to refine the claims and counterclaims will assist the arbitral process. Yet in many cases, the need to draft such Terms blocks a case from proceeding without time-consuming administrative steps.<sup>15</sup>

The Stockholm Chamber of Commerce rules require a final award within six months from referral of the dispute to the arbitral tribunal, presumably to foster efficiency, even though this deadline normally proves quite out of the question for “big ticket” cases raising

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<sup>13</sup> Article 22(1) of the ICC Rules of Arbitration.

<sup>14</sup> Articles 23(1) and 33 of the ICC Rules of Arbitration.

<sup>15</sup> Although an outright refusal of a party to sign the Terms of Reference would lead the ICC to step in and approve the Terms, the delay may be due not to any refusal to participate, but because one side misunderstands the process, or because the ICC differs from the arbitral tribunal on what should be included in the Terms. Article 23(3) of the ICC Rules provides, “If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference have been signed ... or approved by the Court, the arbitration shall proceed.”

complex legal and factual questions.<sup>16</sup> Still the SCC routinely requires the arbitral tribunal and counsel to make a reasoned award for an extension, even when the deadline falls before presentation of evidence or argument.

Some institutions require arbitral awards to be witnessed or notarized. At the same time, from a concern about award enforceability, the institution will deny a three-member tribunal the right to execute an award in counterparts. The result may be an unattainable and contradictory effort to produce an electronic copy of an award for purposes of speed (to meet an enforcement deadline) while at the same time insisting that all three arbitrators execute the same signature page with the same witnesses or notarizations.

### III. The Enforcement Stage

#### A. The Law of Arbitration

Arbitral awards do not normally become unenforceable simply because they are wrong, or because the process has been long and costly.<sup>17</sup> However, award annulment or non-recognition could be the destiny of an arbitrator's decision reached through proceedings that constituted a serious departure from fundamental rules of basic procedural fairness.<sup>18</sup>

In most modern legal systems, the law of arbitration (as distinct from the specific legal rules applied to decide a particular dispute) comprises statutes, cases and treaties to guide the interaction between arbitrators who decide cases and judges who review awards.<sup>19</sup> This legal structure includes two distinct limbs. First, parties should be held to their bargains

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<sup>16</sup> Article 37 of the SCC Arbitration Rules.

<sup>17</sup> See, e.g., Federal Arbitration Act § 10; Article 1520 of the French *Code de procédure civile*; Article 52 of the ICSID Convention of 1965.

<sup>18</sup> Indirectly of course, sanctions for violation of due process will promote accuracy, by encouraging arbitrators to listen to both sides before deciding, thus augmenting the information available to the decision-making process.

<sup>19</sup> International disputes usually implicates more than one jurisdiction and therefore require thoughtful arbitrators to take into account several sets of arbitration laws. In particular, arbitrators may need to reconcile arbitration regimes of the seat of arbitration with the arbitration laws of a country where award's enforcement will be sought.

to arbitrate. Second, the courts and institutions which enforce the commitment to arbitrate must also monitor the basic integrity of the arbitral process, so as to enhance the prospect that cases will be heard by fair individuals who listen before deciding, stay within their mission, and respect the limits of relevant public policy.

A certain irony exists in penalties for breach of an arbitrator's duty to provide fair hearings. The sanction of award annulment falls not so much on the arbitrator who breached his duty,<sup>20</sup> but rather on the prevailing party which must suffer annulment of an award that implicated a breach of procedural integrity.

#### B. The Arbitral Seat: Conflict in Action

The arena of judicial review, in France and in England, provides an opportunity to explore some of the tensions among different duties of an arbitrator. As illustrated below, deciding quickly and cheaply can sometimes run afoul of due process; and fidelity to the parties' contract can occasionally conflict with mandatory norms of an enforcement action.

##### 1. New Theories and Due Process

In each of the cases discussed below, experienced tribunals sitting in France rendered thoughtful awards that were later vacated because the efficiency of their proceedings failed to provide adequate opportunity for counsel to comment on relevant legal theories.

##### a) Caribbean Niquel

In 2010, the Paris *Cour d'appel* decided the case of *Caribbean Niquel v. Overseas Mining*,<sup>21</sup> which implicated the parties' rights to address new legal theories in a context that pitted the aim of efficiency against the goal of due process. After a Cuban mining venture had gone sour, arbitrators sitting in Paris awarded the claimant US\$45 million on a theory of

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<sup>20</sup> Even if they may suffer loss of reputation, offending arbitrators can benefit from immunity notwithstanding having violated their duty of basic procedural integrity. In one case, a sole arbitrator failed to disclose a romantic relationship with the sister of respondent's counsel. Immunity was upheld even though the award had been vacated. See *La Serena Properties v. Weisbach*, 186 Cal. App. 4th 893, 112 Cal. Rptr. 3d 597 (Cal. Ct. App. 2010).

<sup>21</sup> *La Société Commercial Caribbean Niquel v. La Société Overseas Mining Investments Ltd.*, Paris Court of Appeals, 1st Chamber, 08/23901, 25 March 2010.



“lost chance” (*la perte de chance*), even though the parties had argued a theory of quantum based on lost profits (*le gain manqué*). One can well imagine that arbitrators would not find it satisfying to apply a “lost profits” theory with respect to a mine that had not yet become operative.<sup>22</sup>

The *Cour d’appel* vacated the award for violation of provisions in the *Code de procédure civile* related to the right to be heard (*principe de la contradiction*<sup>23</sup>) and procedural public policy (*ordre public procédural*).<sup>24</sup> Although not questioning the assumption that arbitrators know the law (often expressed as *jura novit curia*) the French court found it unacceptable that an award should rest on a method of damages calculation that counsel had not had an adequate opportunity to address.

The decision carries its own problems, providing a stark example of the difficulty faced by arbitrators seeking to balance their various duties, with each alternative likely to spring its own special trap. Imagine that the arbitrators in *Caribbean Niquel*, in the midst of their deliberations, had re-opened the proceedings to set a briefing schedule on the new legal theory of lost chance. There would have been moaning all around about added expense and delay.

Had the tribunal raised with counsel the new theory earlier, the tribunal might have been perceived as lacking even-handedness. The respondent could have said, with some

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<sup>22</sup> Indeed, the tribunal held that calculating the lost economic benefit was too uncertain, whereas calculating the value of the chance to take advantage of an economic opportunity could “undeniably” be evaluated. The tribunal therefore based the reasoning in its award on the legal theory that the party should be compensated for the economic value of the lost opportunity.

<sup>23</sup> The oft-used term “*principe du contradictoire*” has been memorialized in the *Code de procédure civile* as the “*principe de la contradiction*”.

<sup>24</sup> As in force at the time of the *Cour d’appel* decision, these provisions were contained in Article 1502 of the *Code de procédure civile*, which provided *inter alia* as follows: “L’appel de la décision qui accorde la reconnaissance ou l’exécution n’est ouvert que dans les cas suivants: 4° Lorsque le principe de la contradiction n’a pas été respecté; 5° Si la reconnaissance ou l’exécution sont contraires à l’ordre public international.” A 2011 decree moved these two clauses to Article 1520 of the state statute, albeit with the same formulation.

justification: “You arbitrators are acting as advocates, signaling that claimant’s chances of success will increase with a pleading amended to include new damages theories.”

Finally, it would have been equally problematic for the arbitrators to decide the case without consideration of the “lost chance” measure of damages. The tribunal would face the unattractive choice between granting an award simply for lost profits, yielding an incorrect amount, or denying recovery entirely, which would have penalized an otherwise meritorious claim.

An arbitrator’s attempt to improve proceedings from one perspective can make things worse from another angle. Enhancing efficiency can reduce fairness and accuracy. To complicate matters further, the concepts of fairness, accuracy, efficiency and enforceability are not monolithic. Each notion includes multiple obligations. Tensions thus exist not only among those four goals, but also within each of the various distinct yet related duties which in practice often compete one with another. As noted, suggesting to counsel an opportunity to address a new legal theory promotes the parties’ right to be heard, but perhaps at the expense of exposing arbitrators to a charge of being biased.

#### b) De Sutter v. Madagascar

The tensions within the set of duties guiding arbitrator comportment presented themselves again in France a half-dozen years later, following an award rendered pursuant to the bilateral investment treaty between the Republic of Madagascar and the Belgium–Luxembourg Economic Union. In *De Sutter et al. v. Madagascar*, an ICC award had been rendered in favor of Belgian textile manufacturers that had suffered damage due to labor strike at the factory, which as it happened accompanied a *coup d’état* in Madagascar.<sup>25</sup>

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<sup>25</sup> Cour d’Appel de Paris, Arrêt du 16 Mars 2016, Pole 1 – Chambre 1, RG 14/ 19164. The underlying award had been rendered under the ICC Rules (as permitted by the treaty) by an eminent Paris-based American arbitrator.

When a Madagascar insurer refused to reimburse the investors for the damage, a lower court in Madagascar rendered a judgment in favor of the Belgian investor, finding the loss covered by the policy as having originated from labor unrest rather than riot of a political nature. Later, the execution of that decision was suspended by Madagascan authorities, triggering the arbitration under the investment treaty, which permitted selection of the ICC Rules to govern the procedure.

According to the sole arbitrator, the Madagascan court's decision to suspend execution of the judgment's execution derived not from the interests of justice, according to applicable law, but because the insurance company was owned by the Madagascar government. Consequently, the treaty had been breached in respect of its third Article, including *inter alia* the duty to accord fair and equitable treatment to investors. So far, so good.

As in *Caribbean Niquel*, the difficulty came in the way the arbitrator characterized damages. The request for capital and interest (the amount granted by the Madagascar court) had been rejected by the arbitrator as outside treaty coverage, given that the underlying claims were still pending and thus precluding expropriation as such.

Under the circumstances, however, the arbitrator ordered payment of an amount equal to interest (at the legal rate in Madagascar) running from the date of the 2012 local court judgment through June 2014, shortly before the award was issued. The arbitrator determined this amount as fair compensation for gain to which claimant had been entitled but was unable to enjoy ("*bénéfice dont PGM n'a pu profiter*") due to the suspension.

The Paris *Cour d'appel* vacated the award pursuant to Article 1520(4) of the French *Code de procédure civile* which as mentioned earlier addresses breach of the right to be heard, referred to as *principe de la contradiction* in the French text. Through a multitude of those clauses which provide such difficult reading for common law jurists, each introduced

by the rhetorical device *considérant que* (“considering that”), the Court seemed to reason that the arbitrator could not, without inviting comment by counsel, substitute an amount of damages during the period of suspension in Madagascar for the sum actually requested by the claimants.<sup>26</sup>

Contrary to what William Shakespeare suggested about a rose by any other name smelling as sweet,<sup>27</sup> allocation of the interest under a different label (in substance taken from the claimants’ original request) was deemed unsatisfactory to the reviewing French court. The case underscores the frequent overlap between a simple mistake (normally unreviewable under modern arbitration statutes) and matters of due process, with the latter (like excess of authority) remaining grounds for annulment.

## 2. Cost Allocation and Contract Terms

To explore how one set of arbitral duties may collide with another, few examples serve better than the norms for cost allocation in England, which in some instances prove at odds with fidelity to the parties’ agreement, as well as the requirements for award enforcement in other fora.

The 1996 English Arbitration Act invalidates pre-dispute agreements to allocate arbitration costs “in any event”.<sup>28</sup> In advance of the dispute, parties may not by contract forbid an arbitrator from taking into account who won and who lost when allocating costs.<sup>29</sup>

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<sup>26</sup> The total amount requested by claimant initially had come to approximately €5.8 million, while the interest element (characterized as “*bénéfice*” in the award) came to €91 thousand.

<sup>27</sup> William Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

<sup>28</sup> Section 60, Arbitration Act of 1996: “An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.” Section 61 goes on to set forth the general principle that “costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs”. This standard, however, is made subject to the parties’ agreement otherwise, which in context with Section 60 would be an agreement after the dispute has arisen.

<sup>29</sup> To be clear, the statute does not impose the English “costs follow the event” rule in all events, but simply invalidates pre-dispute attempts to eliminate the arbitrator’s discretion to

The provision casts a wide net, serving not only as an anti-abuse mechanism to prevent ‘you-pay-in-any-event’ clauses from discouraging claims by weaker parties, but also catches otherwise reasonable arrangements among sophisticated business managers.

Promoting award enforceability by complying with English law remains a problematic proposition in an international case. Consider what an arbitrator should do in the following situation.

The parties have decided to arbitrate in England, but also subjected their contract to the law of New York. The contract contains an explicit provision that in any arbitration the two sides will split arbitrator compensation on a 50/50 basis. Even more significant from a financial perspective, the agreement says each side covers its own arbitration-related legal expenses.

Flouting clear contract language on cost allocation would comply with English law.<sup>30</sup> However, to disregard the contract, which requires each side to bear its own expenses, might well (and not unreasonably) appear as an excess of authority to a New York court called to enforce an award costs. Disregard of contract terms would also be less than appealing from the perspective of accurate implementation of the parties’ agreement.<sup>31</sup>

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consider who won and who lost in fixing obligations for items such as attorneys’ fees and amounts paid to the arbitrators and the arbitral institution.

<sup>30</sup> Presumably, Section 68 of the 1996 Act (“serious irregularity causing substantial injustice”) permits judicial action to correct an arbitrator’s failure to respect Section 60.

<sup>31</sup> A landmark decision of the U.S. Supreme Court implicated a similar dilemma, albeit with respect to substantive norms rather than procedure. See *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). An agreement involving a Japanese auto manufacturer and an American dealer provided for application of Swiss law by arbitrators in Japan, a choice explained by the existence of a Swiss affiliate of a joint venture company in the distribution chain. Ordering arbitration, the Court warned that American antitrust law must be considered in connection with any counterclaim, despite the contractual choice-of-law clause. *Mitsubishi* footnote 19 suggests a ‘prospective waiver’ doctrine that would invalidate choice-of-law agreements that operated to waive a right to pursue American remedies. Moreover, the so-called “second look” doctrine in *Mitsubishi* warned that American courts would exercise their power at the award enforcement stage to “ensure that the legitimate interest in the enforcement of the antitrust laws [of the United States] had been addressed”.

What is a conscientious arbitrator to do? Remain faithful to the parties' agreement? Respect the procedural law at the arbitral seat? Or look to the laws to be applied by the enforcement court in New York? Occasionally, nuanced approaches to award may provide an exit from this particular quandary. However, the dilemma demonstrates again how the achievement of counterpoise among rival goals remains an enduring challenge of arbitration policy and practice.

#### IV. Good Practices

In arbitration, the elusiveness of counterpoise among rival goals should not be surprising. Vigorous discussion also exists on the optimum way to conduct court proceedings, both on a comparative level (considering different national systems) and as between positions taken by different scholarly camps and judicial circuits in a single country.

To take an illustration, arbitrators often struggle with the wisdom of granting “dispositive motions” (equivalent to “summary judgment” in some legal systems) dismissing a claim at the outset of an arbitration pursuant to a preliminary ruling, without full consideration of testimony.<sup>32</sup> Such applications may be permitted pursuant to the express or implied terms of institutional rules,<sup>33</sup> and on occasion pursuant to the terms of the parties' agreement.<sup>34</sup>

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<sup>32</sup> See e.g., *Buchheit Int'l Ltd. v. Overseas Private Inv. Corp (OPIC)*, AAA Case No. 50T 195 00361 03 (2004), with a summary judgment motion granted under AAA Commercial Rules Article 30(b). See Robert O'Sullivan, “Motion Practice in Arbitration”, in *International Commercial Dispute Resolution*, 39 INT'L LAWYER 235, at 239–41 (Mark A. Garfinkel ed. 2005). See also James H. Carter, *Dispositive Motions in International Arbitration and the Role of U.S. Court*, in *INTERNATIONAL ARBITRATION: CONTEMPORARY ISSUES* 39 (24th Sokol Colloquium, Univ. Virginia, ed. J.N. Moore 2013).

<sup>33</sup> See e.g., AAA Commercial Arbitration Rules, Article 30(b), providing that an arbitrator, exercising his or her discretion [may] direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. Compare 2012 ICC Arbitration Rules providing that “in order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.” See also 2014 LCIA Rules Article 14.4 a duty to adopt procedures suitable to the circumstances of the arbitration,

The appropriateness of ending the arbitration before a full hearing will depend on the factual configuration of the case.<sup>35</sup> In some instances, the equivalent of a summary judgment rule in arbitration may have unintended consequences, adding rather than reducing cost.<sup>36</sup>

In national court proceedings, analogous questions arise about when to allow claims to be dismissed early in the proceedings. The questions usually work themselves out in connection with broader policy discussions by legislatures or courts about litigation costs and

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avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.

<sup>34</sup> See decision *Travis Coal Restructuring Holdings LLC v Essar Global Fund Limited*, [2014] EWHC 2510 (Comm), involving an application to enforce in London an award made in New York, opposed in part on the grounds that the arbitrators had exceeded their authority in making an award pursuant to a request for summary judgment. The opinion by Mr. Justice Blair noted *inter alia* that the relevant contract provided that “the arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue.”

<sup>35</sup> In *Travis Coal (infra)*, the court went into detail on the facts of the dispute, which implicated a complicated share purchase transaction, with a guarantee of the sale purchase price contained an ICC arbitration clause providing for proceedings seated in New York. After failure to make payments, an arbitral tribunal issued an award in favor of the beneficiary of the guarantee. Although ultimately adjourning the enforcement action pending resolution of an annulment motion before courts in New York, the learned judge expressed serious doubts about success of the application to vacate. He noted that in fact the arbitral tribunal had moved beyond a simple summary judgment process, and actually heard testimony on key questions of fraud. The court also emphasized the context of the case, citing the award, “As a commercial center, New York is even more rigorous in expecting that parties that have given a written guarantee of performance – in which they waive certain defenses and disclaim certain subjects of reliance – will promptly honor their commitments”

<sup>36</sup> In 2006 the ICSID Arbitration Rules were amended to add provision for a preliminary objection that a claim is “manifestly without legal merit”. Doubtlessly intended to make proceedings more efficient by allowing a hopeless case to be put to rest early, some observers express concern that the rule encourages Respondent’s to file such complaints as a matter of course, inserting an unnecessary procedural step. Article 41(5), ICSID Arbitration Rules.

social justice. Some legal systems authorize summary judgment for specific types of transactions, particularly with respect to financial instruments.<sup>37</sup>

The stakes may differ as between judicial and arbitral proceedings, since court judgments remain appealable on the substantive merits of the decision, while arbitration awards normally do not. Thus the results of “getting it wrong” may prove more dramatic for an arbitrator’s decision than for that of a judge.

In some legal systems, deeper social and economic issues work themselves into what at first blush appear to be relatively formalistic pleading requirements, particularly with respect to rules on dismissal of complaints for failure to state a claim. Standards have fluctuated with respect to rival concern about litigation expense, on the one hand, and access to justice, on the other.

Liberal federal practice in the United States long allowed “notice pleading” under which courts allowed an action to proceed as long as the trial judge could construe a complaint to state some semblance of a case.<sup>38</sup> Later, experience with the high cost of discovery led the U.S. Supreme Court to raise the bar by interpreting the law to require enough facts to state a claim to relief “plausible on its face.”<sup>39</sup> The approach was later

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<sup>37</sup> See e.g., French Nouveau code de procédure civile (NCPC), Art. 1405 (2) (formerly Code de commerce, Art. 641), granting French courts the power to issue a payment order (*injonction de payer*) with respect to promissory notes and other negotiable instruments.

8 For an analysis of factors that explain

<sup>38</sup> Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint need include only “a short and plain statement of the claim showing that the pleader is entitled to relief”. The U.S. Supreme Court once construed this rule to preclude complaints from being dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>39</sup> *Twombly v. Bell Atlantic Corp*, 550 U.S. 544 (2007) involved a putative class action for alleged market allocation by cable companies in violation of American competition law. The mere fact of competitors acting in the same fashion (“conscious parallelism”) would normally be insufficient to state a claim for violation of the Sherman Act. Some “plus factor” must indicate an anti-competitive agreement. In *Twombly*, the Second Circuit Court of Appeals held the complaint could not be dismissed unless “no set of facts” would permit plaintiffs to demonstrate collusion rather than coincidence. The U.S. Supreme Court reversed, citing



refined to require courts in essence to apply their experience to screen out weak claims, a task that sometimes carries political overtones.<sup>40</sup>

Whether conducted by courts or by arbitrators, decisions on dispositive applications and motions to dismiss claims will usually elude “black letter” rules. Instead, such measures put a premium on understanding the nuances of how procedural principles interact with rival concerns about cost and justice.

#### V. Counterpoise and Common Sense

An oft-quoted line from the philosopher Francis Bacon suggests, “If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.”<sup>41</sup> Careful observers will note how the proposition proves overbroad in both its limbs. Some individuals end their intellectual pilgrimages as self-assured as they began, while others retain doubts all along the way.<sup>42</sup>

Despite its extravagant nature, the aphorism points to the rewards of a healthy humility (close cousin of doubt), which in arbitration as elsewhere often enhances sound

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concerns about litigation expense which required a pleading of enough facts to state a claim that is “plausible on its face.”

<sup>40</sup> *Twombly* was followed by *Ashcroft v. Iqbal*, 556 U.S. 662 (2008), where a detainee’s complaint was dismissed for failed to plead sufficient facts to state a claim for purposeful discrimination. A Pakistani Muslim claimed mistreatment while held for terrorist connections after improperly obtaining a Social Security number. Following release, the detainee alleged racial and religious bias by the FBI Director and former U.S. Attorney General, seeking relief for violations of various Constitutional rights. In a 5-4 decision, the U.S. Supreme Court reversed a lower court decision refusing to dismiss the claim. The Court found a plausible explanation for the detention, other than purposeful targeting of Arabs and Muslims. According to the Supreme Court majority, a non-discriminatory aim to detain illegal aliens with terrorist connections might, in the post-9/11 world, produce a disparate but incidental impact on Arabs and Muslim. This alternative explanation meant that the complaint failed to plead sufficient facts to state a claim for purposeful discrimination.

<sup>41</sup> Francis Bacon, *OF THE PROFICIENCE AND ADVANCEMENT OF LEARNING, DIVINE AND HUMAN* (1605). The careful reader will note the shift from “will” to “shall” in each half of the sentence, perhaps suggesting that wilful insistence on being right ultimately leads to self-doubt, while an intentional openness to ideas yields confidence in the end.

<sup>42</sup> Some people seem to finish their intellectual pilgrimage as self-assured as they start, while others remain invariably confused by doubts, with little progress along the way.

analysis. In the real-life drama of arbitration, tensions among legitimate adjudicatory aims often resist facile resolution. While some solutions may be better than others (and some doubtless worse), finding an optimum path often proves easier after acknowledging that no trail will be perfect. Usually it proves healthier to speak of “good ways” to do things, rather than to assert “best practices” commending themselves across the board.

Hearing additional testimony may enhance fairness at the expense of speed and economy. An arbitrator’s suggestion that counsel consider a new legal theory might promote an accurate result, but at the risk of creating perceptions of arbitrator bias. Willingness to reconsider discovery rulings could yield helpful documents, while at the same disrupting a delicate briefing timetable and jeopardizing hearing dates.

Beginning with too much certainty about procedural questions, some arbitrators (like some scholars, judges, lawyers and list-serve pundits) may later find themselves blindsided by facts indicating a different direction of analysis. An affirmation that some conclusion “surely must be the case” can add rhetorical punch, but at the cost of producing an astigmatic vision of costs and benefits. Particularly in international arbitration, more than one path may prove useful to resolve a procedural dilemma.

In some instances, one course of conduct commends itself over alternatives. In other cases, rivalry among various goals may prove more troublesome, with competing options neither better nor worse than one another, just different. Compromise and open-mindedness, more than dogma or ideology, usually remain the touchstone for sound counterpoise among aspirations to accuracy, fairness, efficiency and enforceability,<sup>43</sup> with good judgment rather than cleverness proving the hallmark of an effective arbitrator.

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<sup>43</sup> For perspectives with an alternative emphasis, see RICHARD WEISBERG, IN PRAISE OF INTRANSIGENCE: PERILS OF FLEXIBILITY (2014); William W. Park *Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion* (2002 Freshfields Lecture), 19 ARB.

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INT'L 279 (2003). As in so many questions, arguments often turn on examples and contexts considered.